75-1910

Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No.

ROBERT E. FORD,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1975

No.

ROBERT E. FORD,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert E. Ford, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on April 15, 1976, which affirmed a judgment of conviction previously entered against him in the United States District Court for the Southern District of New York (Appendix "A" hereto, *infra*, p. 1a). The Court of Appeals denied both rehearing and rehearing *en banc* on June 2, 1976 (Appendices "B" and "C" hereto, *infra*, pp. 3a-6a).

Opinions Below

The Court of Appeals affirmed in a yet unreported memorandum order (1a-2a) which did not discuss the merits of petitioner's contentions on appeal, *United States* v. *Boyd, et al.*, — F.2d — (April 15, 1976).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals was filed on April 15, 1976 (1a), and the Court of Appeals denied both rehearing and rehearing *en banc* on June 2, 1976 (3a-4a).

This petition is filed within thirty days of the denial by the Court of Appeals of the petition for rehearing.

Questions Presented for Review

This petition presents several related questions of importance to the administration of justice in the Federal courts. In recent years, Federal prosecutors have steadily increased the number of indictments which ensnare fringe defendants in a far-flung conspiracy net, thus subjecting those defendants to lengthy multi-defendant trials and minimizing the opportunity of such defendants to receive individualized consideration by the jury. The multiple conspiracy problems generated by such tactics have become daily subjects of consideration by the district and circuit courts. In view of the burden placed upon the time and resources of the District and Circuit Courts by rambling multi-defendant conspiracy trials, and in view of the due process and venue issues involved, it is respectfully submitted that this Court ought turn its consideration to current multiple conspiracy problems. This case presents an ideal vehicle for such consideration.

1. Was petitioner deprived of a fair trial in that the trial proof demonstrated that the Conspiracy count of the indictment was in fact a conglomeration of multiple conspiracies of which petitioner was not a member?

2. Did the district court err in its charge to the jury with respect to the issue of multiple conspiracies?

3. Was the district court without venue jurisdiction since such jurisdiction was predicated upon a stock manipulation conspiracy of which petitioner was not a member?

4. Did the district court err in refusing to charge the jury with respect to the venue issue that was presented by the multiple conspiracy claim?

Constitutional Provisions and Statutes Involved

United States Constitution

Article III, Section 2, Paragraph 3

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law. . ."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . . * * * ."

United States Code

Petitioner was charged with Conspiracy (18 U.S.C. § 371), Mail, Wire and Securities Fraud (18 U.S.C. §§ 1341 and 1343; 15 U.S.C. § 77q), Sale of Unregistered Securities (15 U.S.C. § 77e) and the Making of False Statements to the Securities and Exchange Commission (18 U.S.C. § 1001). No issue is presented in this petition with respect to the construction of those statutes; they are not, therefore, set forth herein.

Federal Rules of Criminal Procedure

Rule 14

"Relief from prejudicial joinder.

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." [As amended February 28, 1966, eff. July 1, 1966].

Rule 18

"Place of prosecution and trial.

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The

court shall fix the place of trial within the district and with due regard to the convenience of the defendant and the witnesses." [As amended February 28, 1966, eff. July 1, 1966].

Statement of the Case

After a jury trial in the Southern District of New York, petitioner, an attorney, was convicted upon one count of Conspiracy (18 U.S.C. § 371) and fifty-two substantive counts with respect to alleged fraud and misstatements relating to the funding of a public company and the sale of its securities (18 U.S.C. §§ 1001, 1341, 1343; 15 U.S.C. §§ 77e, 77q).

The indictment, as consolidated with another related indictment, named sixteen defendants and four unindicted co-conspirators. The government's bill of particulars named an additional thirty-three unindicted co-conspirators. Thus, the overall conspiracy was alleged to have had at least fifty-four participants (A. 16, 100).*

The Conspiracy count of the indictment, which named all defendants, alleged the following to be the objective of the conspiracy:

> "The object of the conspiracy was to obtain control of a 'shell' corporation without any substantial assets, inflate artificially its price, and sell, pledge and distribute the shares at enormous profits to members of the public without providing material information required to be furnished by law." (A. 18).

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* References to the appellant's appendix, filed in the Court of Appeals, are preceded by "A.".

The Conspiracy count also alleged that the conspiracy was 'carried out' by several distinct means:

> "1. Evasion of registration requirements;
>
> "2. Certification of a false statement as to the capital structure of the Corporation;
>
> "3. Creation of an artificial market in the Corporation's stock by means of manipulation;
>
> "4. The making of false statements and writings in connection with the Securities and Exchange Commission investigation of the Corporation;
>
> "5. The sale, pledging and other disposition of corporate stock to lenders, factors and purchasers." (A. 18-20).

Petitioner is a resident of Abilene, Texas, where he has been a member of the Bar of that State for over twenty-six years. He was essentially a small town lawyer, whose practice involved trial work, real estate and land transactions. He is an honorably discharged veteran of World War II, and has never been convicted of a crime (A. 1327-8).

The corporation in question was named "Select Enterprises, Inc." [hereinafter, "Select"]. Petitioner was never an officer or board member of Select (A. 1328). His involvement in the case commenced solely by virtue of his being retained with respect to contracts and title opinions for certain acquisitions that eventually became corporate assets. The proof at trial, if believed and interpreted in accordance with the government's theory of the case, connected petitioner only with items two and four of the above noted list of "means" by which the allegedly single conspiracy operated. In short, he is alleged to have assisted in the making of false statements concerning certain aspects of the capital structure of the

so-called shell corporation. Even in this respect, he had no knowledge or involvement concerning much of the corporate capital structure (A. 1399).

Much of the trial, however, concerned items one (evasion of registration requirements), three (creation of an artificial market for the stock by means of manipulations in New York—the basis for venue in the Southern District of New York) and five (illegal sale, disposition and pledging of corporate stock). Petitioner was not shown to have had any actual or circumstantial knowledge or participation in any of these events.

Petitioner never discussed the issuance of stock with anyone; he never spoke in person or by phone with any broker in New York concerning the Corporation or its stock; he never gave an opinion to anyone to the effect that the stock could be free-traded; nor did he ever give any quotation as to the value of the stock (A. 1399). He never pledged or sold any of the stock, nor did he ever discuss the fabrication of evidence to be given to the Securities and Exchange Commission (A. 1400-2). No government witness testified that he engaged in or had knowledge of any of these activities.

Significantly, there was no showing at trial that petitioner had any expertise with respect to the securities laws. Indeed, he had never even had a stock brokerage account (A. 1400).

Much of the government's proof at trial involved the creation in New York of a market for the stock of Select by means of a variety of illegal manipulative procedures. Most of the persons involved in those manipulations testified as government trial witnesses, including one Alan Segal, a notorious criminal recidivist who specilizes in stock fraud transactions (*See*: *e.g.*, *United States* v. *Finkelstein*, 526 F.2d 517 [2d Cir., 1975]). None of

the persons engaged in those activities ever had anything to do with the petitioner, nor was there any evidence at trial that petitioner had any knowledge that such market manipulations were occurring.

Reasons for Granting the Writ

I.

There were presented four fundamental questions for the jury's proper resolution with respect to petitioner: 1) Did petitioner's conduct as an attorney in Texas and California with respect to certain capital acquisitions of Select constitute one or more criminal violations of the laws of the United States?; 2) If he did engage in such violations, was he also a member of a much larger conspiracy to manipulate the market in and illegally sell or otherwise dispose of the stock of the corporation—a conspiracy which operated out of New York?; 3) If he was not a member of the aforementioned larger conspiracy, was venue improperly laid against him in the Southern District of New York?; and 4) was the indictment defective since it joined in one conspiracy count at least two conspiracies, which may be characterized, respectively, as the greater and lesser conspiracies, and since petitioner was not shown by the proof to be a member of the greater conspiracy?

Prior to trial, petitioner's trial counsel moved for a severance of petitioner's trial from that of the co-defendants, pursuant to Rule 14 of the Federal Rules of Criminal Procedure. He accurately predicted the complex nature of the trial, the overwhelming aura of corruption which would be generated by the activities in New York of certain conspirators who entered guilty pleas and who would be government witnesses, as well as by the activities of co-defendants on trial, and the unlikelihood that the government would connect petitioner to the variety of

conspiratorial objectives which eventuated in proof of multiple conspiracies (A. 1148-1161). The District Court denied the motion (A. 1162).

The evils and dangers of multi-defendant conspiracy trials have frequently been the subjects of comments by eminent authorities: *Krulewitch* v. *United States*, 336 U.S. 440, 453-4 (1949) (concurring opinion of Mr. Justice Jackson); 8 *Moore's Federal Practice*—Cipes' Criminal Rules § 8.02[1], p. 8 3 (1970); Wigmore, *Evidence* (3rd Ed.), §§ 1907, 7907; *Scott* v. *United States*, 262 F.2d 398 (5th Cir., 1959).

Having denied the pre-trial motion for a severance, it was the District Court's obligation, at least, to clearly articulate to the jury those protective legal principles concerning multiple conspiracies and venue jurisdiction which are calculated to protect a defendant from the inherently prejudicial effects of a mass conspiracy trial.

The trial court recognized that a jury issue was presented as to whether the indictment had wrongfully charged as one conspiracy what were, in fact, several distinct conspiracies. In attempting to fulfill its resulting obligation, the Court gave a multiple conspiracy charge to the jury.

In its charge, the trial court went on at length concerning the manner in which a defendant may be held liable for conspiratorial activities unknown to him and for acts of unknown conspirators (Tr. 2529-2532; A. 868-870). Then the trial court gave its charge with respect to multiple conspiracies. The totality of the multiple conspiracy charge was as follows:

> "Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which

> the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.
>
> "If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy" (A. 870).

Those two paragraphs of the court's charge are derived from a *portion* of a charge which was found by the Second Circuit to have been proper in *United States* v. *Tramunti*, 513 F.2d 1087, 1107 (2d Cir., 1975).

Petitioner respectfully submits that whatever may have been the appropriateness of the above noted charge, within the context of the remainder of the charge given in *Tramunti*, and within the context of the nature of the facts in *Tramunti*, it was certainly inadequate in the present case. The above quoted paragraphs must have been incomprehensible to the jury.

In *Kotteakos* v. *United States*, 328 U.S. 750, 773 (1946), this Court made clear that the joinder of multiple defendants in a mass trial based upon a conspiracy charge is a situation ". . . exceptional to our traditions and call[s] for use of every safeguard to individualize each defendant in his relation to the mass."

The court's charge thoroughly missed the point that if the activities specifically charged in the Conspiracy

count of the indictment are shown, in fact, to have been a conglomeration of separate conspiracies, then the jury is obliged to acquit. Whatever else the court's charge meant, if anything, it certainly didn't mean that. In view of the utter failure of the court's charge in this respect, petitioner was clearly deprived of a fair trial, and he was deprived of any opportunity on appeal to demonstrate the insufficiency of the evidence against him. Assuming, *arguendo*, that sufficient evidence existed that petitioner participated in one of the improperly joined conspiracies, there is no way of knowing as to whether the jury found him guilty based upon his conduct with respect to *that* conspiracy, rather than one of the other improperly joined conspiracies.

In the event that certiorari is granted, we will endeavor to demonstrate to this Court that, aside from the impropriety in the court's charge, the evidence in this case of petitioner's non-participation in the improperly joined conspiracies was so overwhelming as to have required that the district court grant petitioner's motion for a judgment of acquittal, as a matter of law.

The rather liberal evidentiary rules under which one can be held liable under the conspiracy theory demand, at least, a clear, unequivocal and meaningful jury charge with respect to the multiple conspiracy issue. It is respectfully submitted that the present case presents an appropriate vehicle by which this Court can minimize the existing confusion in the lower courts as to what such a charge should be.

II.

In this case, the conspiratorial acts upon which venue was laid in the Southern District of New York involved market manipulation and stock distribution activities

as to which there was no trial proof whatsoever that petitioner had any knowledge, participation or anticipation. The activities in which petitioner is alleged to have improperly engaged all occurred in the western United States and all related to corporate acquisitions of Select.

A reading of the district court's charge on multiple conspiracies, quoted *supra*, at p. 8-9, reveals that it, at best, charged the jury that if petitioner was not a member of any conspiracy charged in the indictment, they must acquit him.*

If that charge is correct (and we submit it is not) then petitioner could be found guilty even if one overall conspiracy charged by the indictment was in fact a grouping of five distinct conspiracies, although petitioner may have been a member of only one of these. Assuming this to be true, the pellet of the conspiracy shotgun which accurately landed on petitioner must at least have had some venue basis within the Southern District of New York or else petitioner was improperly tried there. Lack of venue is a jurisdiction defect. Failure to prove venue against a defendant taints the indictment, makes it defective and requires its dismissal.

As stated by Mr. Justice Frankfurter in *United States* v. *Johnson*, 323 U.S. 273, 275 (1944):

> "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enact-

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* "If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (A. 870).

> ment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of Constitutional policy even though not commanded by it."

The venue policy in question is made clear by both Article II, Section 2, Paragraph 3 and the Sixth Amendment of the United States Constitution, as well as by Rule 18 of the Federal Rules of Criminal Procedure (all quoted *supra* at p. 5).

Following the district court's charge, counsel for petitioner specifically requested that the district court charge the jury with respect to the requirement of venue in relation to the multiple conspiracy problem:

> "[Defense counsel]: Your Honor said, in effect, if the jury finds that there is a conspiracy to commit any of the crimes in the first indictment [sic], and an overt act committed in the Southern District of New York in furtherance of that crime, that conspiracy, then you may find the defendants guilty.
>
> "I ask Your Honor to charge specifically if they find there was a conspiracy to commit one of the crimes in that indictment, they must find that an overt act directed toward that particular conspiracy must be committed in the Southern District of New York. In effect there were four conspiracies rolled into one. The jury may find that there is one, but yet, as to the one they feel——
>
> "The Court: I would think that you would mount confusion on confusion by asking me to add to what I think is otherwise a very clear statement of the multiple conspiracy situation as announced by the Court of Appeals in a case that

was tried by Judge Duffy. I assume you are familiar with the case I am talking about.

"[Defense counsel]: Tramunti?

"The Court: Yes.

"[Defense counsel]: The problem here is that there are certain problems for some defendants who never left Nevada or Texas, or whatever, and although I realize there is confusion, I think that is caused by the inclusion of one——

"The Court: That would breed confusion rather than clear anything." (A. 901-903).

By refusing to charge as requested by counsel, the district court effectively withdrew that issue from the jury as regards the multiple conspiracy problem. The effect of the court's deficient multiple conspiracy charge combined with its refusal to charge on venue as requested, geometrically multiplied the probability that petitioner was wrongfully convicted.

The district court's erroneous charge with respect to the multiple conspiracy issue, necessarily fatally infected the jury's consideration of the substantive counts of the indictment. The district court charged the jury pursuant to *Pinkerton* v. *United States*, 328 U.S. 640 (1946), that a defendant may be convicted of substantive offenses if such offenses were committed pursuant to a conspiracy of which the defendant was a part. Indeed, petitioner was clearly not established to be a member of those conspiracies out of which all or most of the substantive crimes must have grown.

Conclusion

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY J. BOITEL,
Attorney for Petitioner,
Robert E. Ford,
233 Broadway,
New York, New York 10007,
(212) RE 2-8104.

June, 1976

APPENDIX "A"

Memorandum Order of the United States Court of Appeals for the Second Circuit (April 15, 1976)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket Nos. 75-1393, 75-1424, 75-1426
75-1432, 76-1048

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOE TRUMAN BOYD, ERNEST DARWIN GOODLOE, ROBERT E. FORD, ERNEST R. MULLENAX and M. S. KNISELY,

Appellants.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of April, one thousand nine hundred and seventy-six.

Present: HON. TOM C. CLARK
Associate Justice, United States Supreme Court, Retired

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

APPENDIX A—Memorandum Order of the United States Court of Appeals for the Second Circuit (April 15, 1975)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of said District Court be, and they hereby are, *affirmed* as to all appellants on all counts upon which they were convicted, except that, pursuant to the government's concession, the conviction of appellant Mullenax is *reversed* on substantive counts 2-26, 29-37 and 41-48. Under all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed on Mullenax on the counts which are affirmed. See *United States* v. *Blitz*, slip op. 2761, 2795 n. 46 (2d Cir. March 25, 1976).

We have carefully considered all of appellants' claims of error and we find them to be without merit. Appellants were convicted of serious crimes after a fair trial on the basis of overwhelming evidence. We order that the mandate issue forthwith.

/s/ TOM C. CLARK
TOM C. CLARK
Associate Justice

/s/ WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

/s/ ELLSWORTH A. VAN GRAAFEILAND
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

APPENDIX "B"

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing (June 2, 1976)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 75-1393

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JOE TRUMAN BOYD, JAMES CALVIN JOINER, ERNEST DARWIN GOODLOE, ROBERT E. FORD, SELWYN WEBER, EMERSON F. TITLOW, ERNEST R. MULLENAX, M. S. KNISELY, HOWARD L. BROOKSHIRE, WILLIAM WAYNE BARNETT, MARVIN J. RAPPAPORT, STANLEY SCHLEGER, EDWARD VANASCO, ALAN SEGAL, ROGER BISSETT and JOHN WELLS,
Defendants,

M.S. KNISELY, ERNEST R. MULLENAX, JOE TRUMAN BOYD, ROBERT E. FORD, ERNEST R. GOODLOE,
Defendants-Appellants.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hunderd and seventy-six.

Present: HON. TOM C. CLARK
Associate Justice

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

APPENDIX B—Order of the United States Court of Appeals for the Second Circuit Denying Rehearing
(June 2, 1976)

A petition for a rehearing having been filed herein by counsel for the appellant, Robert E. Ford,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX "C"

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing *en banc* (June 2, 1976)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JOE TRUMAN BOYD, JAMES CALVIN JOINER, ERNEST DARWIN GOODLOE, ROBERT E. FORD, SELWYN WEBER, EMERSON F. TITLOW, ERNEST R. MULLENAX, M. S. KNISELY, HOWARD L. BROOKSHIRE, WILLIAM WAYNE BARNETT, MARVIN J. RAPPAPORT, STANLEY SCHLEGER, EDWARD VANASCO, ALAN SEGAL, ROGER BISSETT and JOHN WELLS,
Defendants,

M.S. KNISELY, ERNEST R. MULLENAX, JOE TRUMAN BOYD, ROBERT E. FORD, ERNEST R. GOODLOE,
Defendants-Appellants.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hundred and seventy-six.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Robert E. Ford, and no

APPENDIX C—Order of the United States Court of Appeals for the Second Circuit Denying Rehearing en banc
(June 2, 1976)

active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is,

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge